

**PUBLIC INTEGRITY COMMISSION  
MINUTES  
April 16, 2019  
10:00 A.M.**

**1. Call to Order:** 10:00 a.m. Present: William F. Tobin, Jr. (Vice-Chair--Acting Chair); Michele Whetzel (Vice-Chair); Commissioners: Andrew Manus; Kyle Gay, Esq. Commission Counsel, Deborah J. Moreau, Esq.

**2. Motion to go into Executive Session<sup>i</sup> and Requests for Advisory Opinions, Waivers and Referrals:** Moved—Commissioner Manus; seconded Commissioner Whetzel. Vote 4-0, approved.

\*\*\*\*\*Commissioner Andrew Gonser, Esq. arrives\*\*\*\*\*

**3. 19-16—Acceptance of Gifts**

PIC received an anonymous email alleging multiple instances of wrongdoing by [a State Employee and/or the agency where he was employed]. After reviewing the email, the only allegation that fell within the Commission's purview was regarding the acceptance of gifts and meals from an agency vendor. Commission Counsel contacted [Employee] to see if he was interested in obtaining an advisory opinion. Shortly thereafter, [Employee] submitted a request for an advisory opinion.

[Employee is a supervisor in a State agency] and has worked there since 2017. In the 1990's, the Agency began a contractual relationship with [Vendor]. For the past 20+ years, [Vendor] has contracted with the Agency to monitor and examine entities licensed by the Agency to confirm regulatory compliance. At the time [Employee began working for the Agency, the Vendor's] contract had last been renewed in 2005. In late 2018, at [Employee]'s direction, the Agency posted a Request for Proposal for services provided to the Agency by [Vendor]. When the bid closed, there was only one qualified applicant, [Vendor]. Because of their long-standing relationship and their proximity to one another, the employees of the Agency and [Vendor] have a friendly and familiar relationship. As a consequence, there has been a tendency to blur the lines between the Agency and [Vendor]. After reviewing the allegations, [Employee] pointed to three separate practices which may have led to the anonymous email.

First, several employees of the Agency and [Vendor] attend a professional conference together a few times a year, each of which lasts three to four days. During each trip, [Vendor] would buy one dinner for the Agency's employees. If the meal had not been paid for by [Vendor], the employee would have been reimbursed the expense by the State as part of their travel expenses. During this time, [Vendor]'s contract was not up for review. Once [Employee] decided he was going to regularly RFP the services provided by [Vendor], he told his employees and [Vendor] that they could no longer allow [Vendor] to pay for their meal(s). Second, during the holidays, [Vendor] gave the Agency's executive employees gift baskets estimated to be worth between \$50 and \$100. Some, or all, of the remaining employees usually received a tin of nuts valued at approximately \$30. When [Employee] became aware of the holiday gifts, he asked [Vendor] to discontinue the practice. Lastly, Agency employees regularly drink coffee that [Vendor] has available in their work space. The expected cost of the coffee is 50 cents per cup.

Addressing the allegations in the anonymous email, [Employee] asked the Commission three questions. First, if it violated the Code of Conduct for Agency employees to accept meals

paid for by [Vendor]? Second, if the Agency violated the Code of Conduct by accepting holiday gifts from [Vendor]? Finally, if it was a violation of the Code of Conduct for employees to drink coffee provided by [Vendor]?

**29 Del. C. § 5806(b): No state employee, state officer or honorary state official shall accept ...any gift...or other thing of monetary value if it may result in:**

**(1) impaired independent judgment in exercising official duties;**

At the time the meals were paid for and the holiday gifts were accepted, [Vendor]'s contract was not under review. However, the recipients were all employees of a State agency that had the capacity to award, or revoke, vendor contracts. While each individual employee may not have had decision-making authority as it related to vendor contracts, the Commission found that it was reasonable to assume that they would have been able to offer input to those employees who did make those decisions. In order for there to be a violation of the Code of Conduct, the gifts and meals did not have to actually result in impaired judgment, only that they *may* have resulted in impaired judgment.

In this case, [Employee] only found out about the holiday gifts when he received a gift basket at his home while he was out of the office dealing with a personal matter. Once he discovered the gift and the sender, he informed [Vendor] that none of the [Agency's] employees, were permitted to accept the gifts and to please stop sending them. Since then, no further gifts have been sent or accepted. At the meeting, [Employee] stated that he believed that he had memorialized his position regarding the gifts by sending an email to his staff but he was not entirely sure. The Commission advised that if he had not already done so, he should make sure that all of his employees have a written copy of the policy.

The acceptance of coffee by the [Agency]'s employees from [Vendor] did not violate the Code of Conduct. Such an item is considered *de minimis*. When government employees receive things of *de minimis* value, the likelihood of the perception that they are turning their public position into a private advantage is diminished.

**(2) showing preferential treatment to any person;**

The meals and gifts were particularly troubling because of [Vendor]'s status as one of the [Agency]'s contractors for over 20 years. Those observers who did not work in the office could believe that the vendor secured their long-term status by providing the meals and the gifts. Since [Employee] had implemented a policy of not accepting gifts, as well as regularly posting the services provided by [Vendor] for RFP, the concerns regarding preferential treatment were obviated.

**(3) government decisions outside official channels;**

There were no facts which indicated that the [Agency]'s employees had made government decisions outside official channels. State employees are entitled to a strong legal presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del. January 29, 1996).

**(4) an adverse effect on the confidence of the public in the integrity of the government of the State.**

This is basically an appearance of impropriety test. *Commission Op. 92-11*. The test is if a reasonable person, knowledgeable of all relevant facts, would still think the employee or

official would be unable to act with honesty, integrity, and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997).

During the period of time that the meals and gifts were being accepted by the [Agency]'s employees, the public would likely have found such actions improper, thus creating an appearance of impropriety. Now those practices had ceased, so too did the appearance of impropriety.

Motion--It was a violation of the Code of Conduct for [Agency]'s employees to accept meals and gifts from [Vendor], one of the agency's contractors. [Employee] should put his policy in writing and provide it to his employees, if he had not already done so. The [Agency]'s employees, including managers, could accept coffee from [Vendor]. Moved—Commissioner Manus; seconded Commissioner Gay. Vote 5-0, approved.

**4. Approval of Minutes for March 19, 2019:** Moved—Commissioner Whetzel; seconded—Commissioner Manus. Vote 5-0, approved.

## **5. Administrative Items**

**A. Legislation:** ID cards—will be introduced this session in a scaled-down format to allow PIC to set procedures without returning to the General Assembly to amend the statute. Confidentiality statute—proposed changes to limit complaints filed by, or against, candidates seeking elected office for 90 days leading up to an election received no support from lawmakers we contacted and is effectively dead. This change was proposed as a result of individuals using PIC for publicity and/or political gain during the last election cycle.

**B. FOIA—**PIC has received numerous and repetitive FOIA requests from an inmate at Sussex Correctional Institute. Commission Counsel discussed with the Commission whether such requests, which seem to have no purpose, are considered harassment under the law. Commission Counsel will speak with other agencies who are receiving similar requests.

## **6. 19-10-Outside Employment**

[Employee] was employed by a State [Agency]. [Agency] provided case management [services for a specific demographic of the population]. [Employee]'s duties included: interviewing clients to gather social and background information; referring clients for appropriate community services; documenting progress; completing case plans and reports; providing counseling to their clients. She was assigned to the Kent County office.

[Employee] also worked at a private business. [The private entity] ran a [housing facility] located in New Castle County. [The private entity] provided many services to families. [Employee]'s duties included answering phone calls; admitting and monitoring clients; and recordkeeping. [Employee] differentiated her two positions by stating that her work [for the private entity] was focused on an area not handled by her State Agency. In the two years she had worked there, she never encountered a family member of a State client.

[Employee] asked the Commission if her part-time work with [the private entity] created a conflict of interest with her State job duties.

**Under 29 Del. C. § 5806(b), State employees may not accept other employment if acceptance may result in:**

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. §5805(1). [Employee] believed that because the focus of each job was different that there was no crossover between her two positions. In her state job she provided counseling to a [broad demographic of individuals], as well as referring them for community services. All of her State job duties were performed in Kent County. At [the private entity] she worked [with a more narrow demographic of individuals] and performed her job duties in New Castle County. The geographic separation between her two job locations made it extremely unlikely that she would encounter a client from one job while performing the duties of her other job, thus practically eliminating the potential to impair her official judgment. However, in the unlikely event that such a circumstance should occur, she was advised to recuse herself from working with the client creating the conflict.

**(2) preferential treatment to any person:**

The next concern addressed by the statute is to insure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. [Employee] may not represent or assist her private interest before her own agency. 29 Del. C. § 5805(b)(1). The Commission decided it was unlikely that [Employee] would be required to represent [the private entity] before [Agency]. [The private entity] did not contract with [Agency] and the clients she worked with at her two jobs were from different [demographic groups]. Nor was it clear how her co-workers and colleagues would be able to show preferential treatment to any person as a consequence of her dual employment.

**(3) official decisions outside official channels:**

There were no facts to suggest that [Employee] would make official decisions outside official channels. That is not to say she would do so, she was entitled to a strong presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd*, No. 304 (Del., January 29, 1996).

**(4) any adverse effect on the public's confidence in the integrity of its government:**

The purpose of the code is to insure that there is not only no actual violation, but also not even a "justifiable impression" of a violation, 29 Del. C. § 5802, the Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). [Employee]'s two positions were not demographically or geographically related making it less likely that she would encounter clients from one job while performing duties related to the other job. In addition, her agency did not contract with [the private entity], mitigating the impression that [the private entity] could benefit from her part-time employment. As a result, the Commission decided that it was unlikely that her dual employment would create an appearance of impropriety.

In deciding if the conduct would raise the appearance of impropriety, the Commission also considered whether the outside employment would be contrary to the restrictions on misuse of public office. 29 Del. C. § 5806(e). One prohibition considered by the Commission under that provision is the State employee may not use State time or State resources (i.e. computer, fax, phone, etc.) to work on the private business. [Employee] worked [at the private entity] outside of her State work hours.

Motion—[Employee]’s part-time work at [the private entity] did not create a conflict of interest with her State job duties as long as she recused herself if necessary. Moved—Commissioner Manus; seconded—Commissioner Whetzel. Vote 5-0, approved.

## **7. 19-12-Outside Employment**

[Employee] worked for a State [Agency]. [Employee]’s job duties were administrative, not clinical. She did not work directly with her clients, nor did she speak to them on the phone or in person. Her role was limited to documenting treatment services provided to each of her clients by [a State contractor]. When one of her clients completed treatment, she would document their discharge from treatment. All of the information she documented was entered into an [Agency] database which contained information about all of the agency’s clients. [Employee] stated that she could only access information related to her clients, not other clients associated with the agency.

[Employee] was offered a position with [Vendor to provide direct services to clients]. [Vendor] was a privately owned Medicaid-approved agency and had been providing outpatient services since 2004. [Vendor] supported people with [a particular disability] in the home and in the community. Her duties would include: developing treatment plans; coordinating outpatient services; and providing counseling. At the meeting, [Employee] stated that [the Vendor] also had an opening for a clinical supervisor. In that position she would be responsible of reviewing the work of other employees. [Employee] did not work with [Vendor]’s clients as part of her State job duties but her [Agency] did contract with [the Vendor].

[Employee] asked the Commission if her part-time work with [Vendor] would create a conflict of interest with her State job duties.

### **A. Under 29 Del. C. § 5806(b), State employees may not accept other employment if acceptance may result in:**

#### **(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. 5805(1). [Employee] did not have any contact with [Vendor] when performing her State job duties. As a result, it was unlikely that [Employee]’s dual roles would adversely affect her professional judgment.

#### **(2) preferential treatment to any person:**

The next concern addressed by the statute is to insure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. [Employee] could not represent or assist her private interest before her own agency. 29 Del. C. § 5805(b)(1). It was unlikely that [Employee] would be required to represent [the Vendor] before [her Agency], even though [the Vendor] did contract with the [Agency], because that work would usually be performed by [the Vendor’s] supervisor. However, at the meeting she admitted that if she were to work part-time for [the Vendor], her State co-workers could ask her about her part-time work and/or clients if they became aware of her dual employment. Additionally, if hired [to have direct contact with the clients], her State co-workers could be required to review treatment plans she would create for [the Vendor]’s clients. Conversely, if [Employee] were to accept a position as a clinical supervisor, there would be less opportunity for her to show preferential treatment to any person and it would be less likely that her State co-

workers would review any of her work. However, that did not end the inquiry. [Employee]'s proposed work as a clinical supervisor is discussed further below.

**(3) official decisions outside official channels:**

There were no facts to suggest that [Employee] would make official decisions outside official channels. That is not to say she would do so, she was entitled to a strong presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd*, No. 304 (Del., January 29, 1996). However, she did point out that her co-workers could be interested in her part-time work and the conversation could turn to clients that were being treated by [Vendor] who were also active with [the Agency]. For that reason, she could not accept a position [having direct contact with the Vendor's clients].

**(4) any adverse effect on the public's confidence in the integrity of its government:**

The purpose of the code is to insure that there is not only no actual violation, but also not even a "justifiable impression" of a violation, 29 *Del. C.* § 5802, the Commission treated this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). [Employee]'s employment with [the Vendor], in either position, would likely create an appearance of impropriety amongst the public because [the Vendor] contracted with her State employer. Her employment on both sides of the contractual relationship would likely lead people to believe that she would be unable to perform her State duties without bias. As a result, she could not accept any employment with [the Vendor].

Motion—[Employee] could not accept part-time employment with [the Vendor] because her job duties would create a conflict of interest with her State job duties. Moved—Commissioner Gay; seconded—Commissioner Gonser. Vote 5-0, approved.

**8. 19-13– Post Employment**

[Employee] worked for a [State Agency] as a Division Director. As a Division Director, he oversaw personnel and budgets. [He was also] responsible for [many of the Agency's projects]. His involvement in those projects was limited to approving documents and contracts. His staff managed the day-to-day activities and made decisions regarding work assignments, including assignments to vendors providing professional services. [Employee] did not participate on professional services selection committees but he did approve the final selection made by the committees. Even though [Employee] could technically override the final choice of a selection committee, the only effect would be to restart the process from the beginning. He could not choose a different vendor than the one selected by the committee. As a result, [Employee] was responsible for everything and nothing [regarding the Agency's projects] other than signing documents on behalf of [the Agency].

[Employee] wanted to continue to [work in the same field after] his retirement. At the meeting he stated that he had been offered a position by [Vendor], an [Agency] contractor. His duties were expected to include: staff supervision; management of project teams; assisting with employee training, recruitment and hiring; operations management. [Employee] would be spending most of his time in Maryland but the position required oversight of the Delaware, Maryland and West Virginia regional operations. During his tenure at [Agency], [Employee] signed off on two of the [Vendor]'s projects, both of which were still active.

[Employee] asked the Commission whether he could work on new projects that the [Agency] could award to [Vendor] after his retirement and specifically, if he could work on the open projects without violating the post-employment restriction in the Code of Conduct.

**For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).**

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7<sup>th</sup> Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not “directly and materially responsible” for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff’d.*, No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official’s responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not “directly and materially responsible” for that particular matter.

The Federal Courts have stated that “matter” must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if [Employee] would be working on the same “matter,” Courts have held that it is the same “matter” if it involves the same basic facts, the same parties, related issues and the same confidential information. *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials*, American Bar Association, Section of State and Local Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico at 842)*. See also *Beebe*.

To determine if there was substantial overlap, the Commission compared the duties and responsibilities during employment to the post-employment activities. Like the matter in *Beebe*, [Employee] worked on the subject matter while working for the State. However, the court in *Beebe* drew a specific line between the subject matter and its application to specific facts. In analogous situations the Commission had approved post-employment positions for [Agency] workers who left State employment to work for one of the agency’s contractors so long as they did not work on the same projects. *Commission Ops. 12-09 and 13-41*. The Commission is to strive for consistency in their opinions. 29 Del. C. § 5809(5).

[Employee’s State] job duties were primarily internal, with little to no contact with vendors or contractors, thus reducing any overlap that could occur between his former job duties and his proposed job duties. However, his approval of [the Vendor]’s open projects prevented him from working on those same projects as a [Vendor] employee. At the meeting, [Employee] spoke about investigating contracts and bids that had been reported as having the appearance of impropriety but when they were investigated, it turned out that the process had not been tainted. His authorization of the two open projects would create the same appearance of impropriety because if someone were to pull the RFP, bids and associated paperwork related to those projects, they would see his signature. [Employee]’s involvement on behalf of [the Vendor], in a project he approved as a State employee, was likely to lead the public to believe that he

approved those projects in anticipation of working for [the Vendor] in the future. In addition, the Commission decided that his authorization of the projects made him materially responsible for them because they could not have moved forward without his signature.

[Employee]’s proposed work for [the Vendor] on new projects, that he had not authorized or had any involvement with whatsoever (including drafting or approving the RFPs, etc.), would not violate the two year post-employment restriction in the Code of Conduct. However, because of his position with the State, [Employee] was likely recognizable to a vast majority of [the Agency’s] employees. As a result, he could not appear before any [of the Agency’s] bid committees, for any project, for two years. That did not mean he could not work on the bid, only that he could not appear in person before his former co-workers or subordinates.

The Commission also reminded [Employee] of the prohibition against revealing confidential information gained during his employment with the State. 29 *Del. C.* § 5805(d).

Motion—[Employee]’s post-retirement employment with [Vendor] would not violate the two year post-employment restriction in the Code of Conduct so long as he abided by the conditions set forth in his formal opinion letter. Moved—Commissioner Whetzel; seconded—Commissioner Manus. Vote 5-0, approved.

## **9. 19-17– Post Employment**

[Employee] worked for a State Agency and retired in June 2017. [Employee]’s duties included, but were not limited to, reviewing responses to requests for proposals (“RFP”) from vendors that would provide supplies and services to the [Agency]. [Employee] was also one of the [Agency]’s employees who would vote on, and award, contracts to contractors. One contractor, [Vendor], was the selected bidder in response to an RFP for which the other three bids were disqualified for not responding to the RFP appropriately. As the result of the successful bid, [Vendor] provided [the Agency] with [supplies, services and personnel]. During the time the contract was in place [Employee] worked with the [Vendor’s] employees as well as State employees.

After [Employee]’s retirement in June 2017, he returned to his former position as a casual/seasonal employee to aid the [Agency]’s transition from [one employee to another]. He remained a casual/seasonal employee until June 2018. [Employee] contacted the human relations department to determine if his separation date was 2017 or 2018. He was told that his separation date was 2017. In June of 2018, a representative of [Vendor] contacted [Employee] to see if he would be interested in working as an independent contractor [for one of the Vendor’s audit projects] to take place in May 2019. [Employee] communicated his interest but because of the post-employment restriction he stated he would not be able to assist them until June 2019. In the fall of 2018, [Employee] began attending training seminars in preparation of performing the audit work. [Vendor] compensated [Employee] a total of \$7,000.00 for his training hours in December 2018 and January 2019.

[Employee] asked the Commission to consider whether he violated 29 *Del. C.* § 5805(d) by accepting payment from [the Vendor] in December 2018 and January 2019. Second, [Employee] asked the Commission to consider if his upcoming audit work in May 2019 would be a violation of the two year post-employment restriction.

**For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3)**

**were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).**

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7<sup>th</sup> Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not “directly and materially responsible” for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff’d.*, No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official’s responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not “directly and materially responsible” for that particular matter.

The Federal Courts have stated that “matter” must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if [Employee] would be working on the same “matter,” Courts have held that it is the same “matter” if it involves the same basic facts, the same parties, related issues and the same confidential information. *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials*, American Bar Association, Section of State and Local Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico at 842)*. See also *Beebe*.

To determine if there was substantial overlap, the Commission compared the duties and responsibilities during employment to the post-employment activities. Like the matter in *Beebe*, [Employee] worked on the subject matter, contracting with [Vendor], while working for the State. However, the court in *Beebe* drew a specific line between the subject matter and its application to specific facts.

[Employee’s State] job duties related to [Vendor] involved the receipt and monitoring of [products and personnel]. [Vendor] was not selected because of any favoritism on the part of the [Agency]. They were selected because they were the only qualified bidder that responded to the RFP. The audit work that [Employee] would be performing for [Vendor] as an independent contractor had nothing to do with his previous job duties. While there could be some overlap in personnel, it did not seem to be a situation in which [Employee] had hoped to use his contact with [Vendor] to benefit himself after he left State service. The audit work itself did not involve the State of Delaware or the [Agency].

Likewise, [Employee]’s attendance at two training seminars did not appear to share any overlapping duties with his previous job duties when he was employed by the [Agency]. Nor was it related to the prior contract that [Vendor] had with the [Agency].

The Commission reminded [Employee] of the prohibition against revealing confidential information gained during his employment with the State. 29 Del. C. § 5805(d). In addition, he was advised that the two year post-employment restriction does not expire until June 2020 because his work as a casual/seasonal employee extended his date of separation from State employment for another year.

Motion—[Employee]’s proposed work as a private contractor for [Vendor] and the monies he received for attending two training sessions did not violate the post-employment restriction in the Code of Conduct. The post-employment restriction applies to his professional endeavors until June 2020. Moved—Commissioner Gonser; seconded—Commissioner Manus. Vote 5-0, approved.

## **10. 19-14--Outside Employment**

Commission Counsel spoke to [an interested individual] on March 13, 2019. She asked about the current applicability of *Comm. Op. 02-60* to various scenarios. (Discussed below). She also mentioned proposed regulations to the DIAA portion of the Department of Education’s regulatory scheme. The Commission reviewed her request at the March 19, 2019 meeting but was unwilling to issue a formal opinion without reading the proposed regulations and gathering additional information. As a result, the matter was added to the agenda for April 16, 2019, meeting.

### **Prior Opinion**

*Commission Opinion 02-60* decided that public school athletic coaches could participate in sports camps, outside of the school year, as long as the camps were open and available to all students. In addition, the Commission stated that the coaches could not be paid for participating in the sports camps in which their school students participated because it would inject a financial interest into the matter which would then create a conflict of interest.

[The individual] was specifically interested in an interpretation of the following excerpt from *Comm. Op. 02-60*:

If the programs are “open, voluntary and available to all athletes,” and “not tied to a specific school” it is likely some attendees would be from a coach’s own school district. While this again gives the coach more time to develop a close relationship with the team member, who may be in his own district, that concern is diminished if the programs are “truly open, voluntary and available to all athletes.” Thus, assuming the programs can be developed with that accessibility and as long as there is “no financial interest” involved, such activity would be permitted...concerns raised by the possibility that coaches will work with some athletes from their own school district resulting in preferential treatment, are diminished by having programs equally available to all athletes, and the concern of using public office for personal gain, etc., is eliminated. Thus the literal application of the law is not necessary to serve the public purpose.

[The individual] then asked:

Does this opinion interpret the State Code of Conduct as prohibiting a coach at a publically funded school from doing any coaching of students from their school or district or can a coach work with athletes from the coach’s school or district if the program is open, voluntary, and available to all athletes and the coach does not have a financial interest involved?

After the March 19, 2019 meeting, the Commission answered this question by affirming [the individual]’s interpretation of the previous opinion. The phrase “open and available to all athletes” was interpreted to mean that any child could try out for a team regardless of economic status. The phrase “financial interest” meant compensation of any kind.

At the April 16, 2019 meeting, the Commission addressed her remaining questions.

## Questions

The remaining questions were:

1. Non-school sport clubs are open, and their coaches can, and currently do, coach athletes who otherwise play on competing school teams. Because these clubs are open and accessible and attract students from a variety of schools, are coaches employed by schools in the State of Delaware free to be employed by them? Are they allowed to coach teams which may include one or more students from their school? If the team includes students from their school would guidelines that establish how many students from a coach's school can be on the club team with the number specifically developed for each sport, be an appropriate guideline for the coach to use to avoid violating the State Code of Conduct?

2. The other term of importance in the 2003 Commission opinion is "financial interest". Are we correct in understanding that there is a clear financial interest if the student were to pay the coach directly for his or her professional coaching services? Is the financial interest of the coach diminished to an acceptable level in the case of sport-specific clubs when the club charges a membership tuition fee for all student athletes who join, but the money reaches the coach indirectly, via the coach's wage or salary? As explained in the prior questions, student-athletes may or may not come from the coach's school. Does this diminish the possibility of preferential treatment for athletes from the coach's school or that the coach is using public office for personal gain?

## Answers

1. Public school coaches may not work for private sports clubs. The Commission did not believe that private sports clubs were open and 'accessible' to everyone because lower-income families could not afford to attend such camps or clubs. The 'open' and 'accessible' factors were the two key factors that the prior Commission cited in their opinion. This Commission agreed. As a result, the Commission did not consider the remaining subparts of the question regarding how many students could be on a coach's club team that were also on the coach's school team.

2. A financial interest exists whether the coaches are paid by the student, parents or a third party. Compensation creates an interest that may impair a coach's judgment when making official decisions, which is prohibited. 29 Del. C. § 5805(a)(2)(a) and 29 Del. C. § 5806(b). As stated in the prior opinion, impaired judgment can lead to favoritism or preferential treatment which can only be mitigated by the lack of a financial interest.

Motion in accordance with 1 and 2 above—Moved—Commissioner Manus; Commissioner Gonser. Vote 4-0, approved.

**11. Motion to go out of Executive Session:** Moved—Commissioner Gay; seconded—Commissioner Tobin. Vote 4-0, approved.

## 12. Adjournment

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<sup>i</sup> Pursuant to 29 Del. C. § 10004(6) to discuss non-public records (29 Del. C. § 10002(6) Any records specifically exempted from public disclosure by statute or common law), as the written statements required for advisory opinions and complaints are subject to the confidentiality standards in 29 Del. C. § 5805(f), 29 Del. C. § 5807(d) Advisory Opinion Requests, and 29 Del. C. § 5810(h) for Complaints. Further, the proceedings, like personnel actions are, by statute, closed unless the

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applicant for the advisory opinion requests a public meeting, 29 Del. C. § 5805(f), 29 Del. C. § 5807(d), or the person charged in a complaint requests a public meeting. 29 Del. C. § 5810(h). No applicant for an advisory opinion, nor a person charged by a complaint has requested an open meeting.